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No. 80-2195

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LEARLEY REED GOODWIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the prosecutor's decision to increase charges against respondent may properly be characterized as "vindictive" prosecutorial action in violation of the Due Process Clause merely because it occurred after respondent elected to be tried by jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 637 F.2d 250. The order of the court of appeals denying rehearing (Pet. App. 17a) is not reported. The opinion of the district court (Pet. App. 18a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on January 9, 1981. A petition for rehearing was denied on April 16, 1981 (Pet. App. 17a). The petition for a writ of certiorari was filed on June 26, 1981, and was granted on November 30, 1981 (J.A. 27).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article II, Section 3 of the Constitution provides in pertinent part:

> [The President] shall take Care that the Laws be faithfully executed * * *.

2. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, respondent was convicted of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977). He was sentenced to consecutive terms of five years' imprisonment on the assault count and one year's imprisonment on the flight count. On appeal, a divided panel of the Fourth Circuit reversed respondent's felonious assault conviction, finding that the charge had impermissibly been brought after respondent invoked his right to be tried by jury on certain misdemeanor and petty offense charges that previously were filed against him.

1. On the evening of February 2, 1976, the vehicle that respondent was driving was stopped for speeding by U.S. Park Policeman James Morrissette on the Baltimore-Washington Parkway (C.A. App. 91-108).[1] Both respondent and Officer Morrissette got out of their automobiles and walked to the passenger side of respondent's car. After checking respondent's driver's license, Officer Morrissette shined his flashlight into the car and asked respondent to lift the armrest on the front seat of the car. Respondent then entered the car, placed it into gear, and rapidly accelerated. As the car started forward, it "fish-

[1] "C.A. App." refers to the joint appendix in the court of appeals.

tailed," striking Officer Morrissette and knocking him onto the back of the car and then into the highway (*id.* at 100-101). When the officer recovered himself, he returned to his car and, with lights flashing and siren sounding, pursued respondent at speeds reaching 95 miles per hour. Respondent nonetheless eluded the officer in heavy traffic (*id.* at 101-103). The following day, Officer Morrissette filed a complaint in the United States District Court for the District of Maryland at Hyattsville, charging respondent with several misdemeanor and petty offense counts, including the misdemeanor count of "assault by striking" a police officer, in violation of 18 U.S.C. 113(d) (Pet. App. 2a; J.A. 10).[2]

Respondent thereafter was arrested on March 11, 1976, and appeared before the United States Magistrate in Hyattsville for a preliminary hearing. At that hearing, respondent sought to have the charges against him dismissed by testifying that he was in Georgia when the incident on the parkway occurred. The magistrate found probable cause, however, and set the case for trial on April 29, 1976 (Pet. App. 2a-3a). After being released on his own recognizance, respondent fled the jurisdiction. He also failed to appear for trial and remained absent from the jurisdiction for over three years (*ibid.*). Respondent later was found in jail in Alexandria, Virginia, and was returned to Maryland by Virginia state correctional authorities (Pet. App. 25a-27a).

2. Upon his return to Maryland, respondent's case was assigned to Ms. Blanche Bruce, an attorney from the Antitrust Division of the Department of Justice who was temporarily detailed in Hyattsville to try petty crime and

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[2] The other charges contained in the complaint were as follows: two counts of speeding, in violation of 36 C.F.R. 50.31; one count of reckless driving, in violation of 36 C.F.R. 50.32; one count of failing to give aid at the scene of an accident, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. §§ 20-102 and 20-104 (1977); and one count of fleeing from a police officer, in violation of 18 U.S.C. 7 and 13 and Md. Transp. Code Ann. § 21-904 (1977) (J.A. 10).

misdemeanor cases before the magistrate. Ms. Bruce performed that duty for a two-week period, during which she was authorized to try complaints filed by law enforcement officers before the magistrate (J.A. 25-26). She did not have authority to try felony cases, to seek indictments from the grand jury, or to file informations (*ibid.*; Pet. App. 23a; Nov. 7, 1979 Tr. 196-197).

At a May 24, 1979 hearing before the magistrate, Ms. Bruce was "approached" by respondent's attorney, who "asked if the government would consider a plea" (J.A. 26). Ms. Bruce expressed interest in the proposal, but respondent later advised counsel that he did not wish to plead guilty and desired a trial by jury before the district court (*ibid.*). It is stipulated that, at this point, "none of the parties in any way considered the fact that a [felony] indictment might or could be brought" against respondent (*ibid.*).

As a result of respondent's plea of not guilty and his request for a jury trial, the case was transferred by the magistrate to the district court in Baltimore and was assigned to Assistant United States Attorney Edward Norton. As part of his pretrial preparation, Norton carefully reviewed the file and interviewed Officer Morrissette. He also conducted an independent investigation into respondent's background. His research disclosed that respondent was involved on a continuing basis in serious violent misconduct and drug-related crimes (Pet. App. 25a-31a).

In view of those facts, which were not ascertained by the United States Attorney's Office until after the case was transferred by the magistrate (C.A. App. 62, 63-64; Pet. App. 27a-31a, 22a-23a), Norton obtained a four count indictment on July 3, 1979, charging respondent with one felony count of forcibly assaulting a federal officer, in violation of 18 U.S.C. 111, and three related counts arising out of the same incident (Pet. App. 25a-31a; J.A. 12-14). As previously noted, respondent was convicted after a jury trial on one felony count of forcibly assaulting a federal officer and on one misdemeanor count of fleeing to evade arrest.

3. Following the jury's verdict, respondent moved to dismiss the felonious assault count of the indictment, contending that the charge gave rise to an impermissible "appearance of retaliation" (J.A. 21).[3] Although respondent did "not assert actual vindictiveness on the part of the Government" (*id.* at 18), he claimed that prosecutor Norton's decision to increase charges after he invoked his right to trial by jury generated an "apprehension of retaliation" (*id.* at 19). He further contended that, "[r]egardless of the actual motivation of the Government * * * [an] appearance of retaliation exists" as a result of the increased charges, and that this "suffices to deprive the accused of due process of law" (*id.* at 21).

In response to that motion, prosecutor Norton filed an affidavit (Pet. App. 25a-31a) explaining his decision to seek a felony charge. The affidavit stated that Norton's investigation of respondent disclosed that, after the initial charges were lodged by Officer Morrissette, respondent had fled to California, where he had been imprisoned for violating the laws of that State (*id.* at 26a). Norton also learned that respondent recently had been tried and convicted in Virginia for attempting to shoot a police officer and for possession of over 500 $20 bags of heroin (*id.* at 29a). Officer Morrissette advised Norton that respondent had committed perjury at his preliminary hearing in Hyattsville, prior to his flight from the jurisdiction (*id.* at 27a-28a). Morrissette further informed Norton that respondent was known to the federal Drug Enforcement Administration and the Washington, D.C. police as a major heroin dealer (*id.* at 28a), and was associated with two persons who smuggled heroin from Mexico and distributed it in Florida, Georgia, and Maryland (*ibid.*).

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[3] Despite the fact that respondent's post-trial dismissal motion was untimely under Fed. R. Crim. P. 12(b), (f), the district court found cause for the delay (Pet. App. 19a-20a) and considered the motion on the merits.

The prosecutor then summarized the facts that warranted obtaining a felony indictment as follows (Pet. App. 30a-31a):

> First, I considered Mr. Goodwin's conduct on February 2, 1976 to be a serious violation of law. He had intentionally resisted a United States Park Police officer in the performance of his duties, striking the officer with an automobile, leaving him perhaps seriously injured on the highway, and fleeing through traffic at a high rate of speed, thus endangering the lives of other drivers.
>
> Second, among the documents I received in the Court file from Magistrate Burgess was a copy of Goodwin's FBI record. That record showed Mr. Goodwin's lengthy history of violent crime.
>
> Third, based on my conversations with Officer Morrissette and Assistant [Virginia] Commonwealth[] Attorney Jones, I judged Goodwin's conduct on February 2, 1976 to be related to major narcotics transactions.
>
> Fourth, I believed Mr. Goodwin had committed perjury in his testimony under oath at the preliminary hearing before Magistrate Burgess on March 30, 1976.
>
> Fifth, subsequent to the filing [of] the initial complaint on February 3, 1976, Mr. Goodwin had failed to appear for a trial scheduled for April 29, 1976.
>
> In summary, my decision to seek an indictment charging Mr. Goodwin with two felonies, 18 U.S.C. § 111 and 18 U.S.C. § 113[c] was based upon the totality of the circumstances set forth above and upon my judgment that his conduct on February 2, 1976 involved not merely a traffic incident on the Baltimore-Washington Parkway but also serious violations of federal law committed by a dangerous individual. My decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court.

4. At respondent's request (J.A. 23), the district court held a hearing on the issue of vindictive prosecution.[4] Following that hearing, the district court found (Pet. App. 22a) that "the prosecutor in this case has adequately dispelled any appearance of retaliatory intent." The court noted that the prosecutor "did not receive all the information relating to the charges against Mr. Goodwin until June 11, 1979" and "did not read the information and decide to seek an indictment until some time thereafter." The court added that "the Assistant U.S. Attorney in this case did not know of the Defendant's prior record until after the Defendant requested a jury trial. Since the prosecutor was not aware of the additional information on which the indictment was based until after the May 24th proceedings before Magistrate Burgess [the proceedings in which respondent requested a trial by jury], it appears far less likely that he was motivated by any vindictiveness" (*id.* at 22a-23a). Finally, the district court rejected respondent's assertion that the indictment should be conclusively presumed to be vindictively motivated simply because it was theoretically possible for the prosecutor to obtain all of the relevant information about respondent's background before respondent exercised his right to trial (*id.* at 23a):

> The Defendant intimates that because the Government had *access* to all the pertinent information prior to May 24, 1979, since a representative of the Antitrust Division of the Department of Justice was appointed for a two-week tour of duty before Magistrate Burgess in the prosecution of misdemeanors and petty offense type cases, that the impermissible appearance of vindictiveness remains. However, the case law does not imply, and the due process clause does not require, that the prosecutor carry such a heavy burden of acquiring all information which is potentially available to him at a given time.

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[4] Respondent and the prosecutor stipulated that the district court should render its decision on the vindictive prosecution issue based on a statement of undisputed facts, affidavits, motion papers, and oral argument. See J.A. 24-25.

5. A divided panel of the court of appeals rejected the district court's assessment of the vindictive prosecution issue and reversed respondent's felony conviction (Pet. App. 1a-15a). The court initially stated that "[o]n this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment" (*id.* at 4a). Although finding no "actual vindictiveness," the majority ruled that there was an appearance of vindictiveness because the filing of the felony charge followed respondent's request for a trial by jury (*id.* at 5a-6a). The court of appeals stated that "the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising" a procedural right (*id.* at 4a-5a). It added that "the *fear* of prosecutorial vindictiveness, as well as *actual* vindictiveness," has a "chilling effect" on the exercise of procedural rights, and therefore is protected against under the Due Process Clause (*id.* at 5a; emphasis in original). The court cited *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), in support of this conclusion (Pet. App. 4a).

The court of appeals distinguished this Court's decision in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), which held that a prosecutor may threaten a defendant with increased charges during plea negotiations and then may "up the ante" if the defendant insists on his right to stand trial. The court noted that in this case, in contrast to *Bordenkircher*, respondent was not expressly threatened with increased charges if he elected to stand trial. The court reasoned that the absence of a threat indicated that a due process violation could be found to exist here although there was none in *Bordenkircher* (Pet. App. 6a-8a).

Finally, the court ruled that the prosecutor could not rebut the appearance of vindictiveness unless he presented evidence showing that "the increased charges could not have been brought before the defendant exercised his rights" (Pet. App. 10a). The court stated that "[l]est

exercise of the right to a jury trial be chilled, the due process clause requires that defendant be freed of the apprehension of retaliation by prohibiting the bringing of more serious charges, * * * at least where there [was] no showing that the charges could not have been brought before defendant made his election for a jury trial" (*id.* at 6a). Thus, in the view of the court of appeals, there is a "*per se* violation of the due process clause" when more serious charges are substituted and there is no "proof by objective evidence that the increased charges could not have been brought in the first instance" (*id.* at 9a). The court expressed disagreement with decisions of other circuits that allow a "more far-reaching inquiry" into the issue of prosecutorial vindictiveness (*id.* at 9a n.1).

Judge Widener dissented (Pet. App. 14a-15a). He concluded that the prosecutor's filing of increased charges in the present case, after plea negotiations broke down, was a fortiori proper under this Court's decision in *Bordenkircher* (*ibid.*; emphasis in original):

> As the majority correctly notes, *Bordenkircher* "held that a prosecutor does not violate due process by threatening to increase charges in the course of plea bargaining and then following up on that threat after plea negotiations break down." * * * Applying *Bordenkircher* to our case, if the government had threatened to prosecute Goodwin for assaulting the officer during the plea negotiations which did take place, and then had indicted Goodwin for that crime when the plea negotiations broke down, such conduct would have been approved under *Bordenkircher*. But because of the lack of a threat by the prosecutor to indict, the majority sets aside the conviction because "the circumstances surrounding the felony indictment [the assault on the officer] give rise to a general risk of retaliation." * * * The court now holds that while an expressed threat of retaliation will not suffice to set aside a conviction because of *Bordenkircher*, merely a general risk of retaliation without the expressed threat will suffice. If we analyze what the prosecutor did in *Bordenkircher*, we see that in that

> case he deliberately threatened the defendant with indictment for an additional offense in order to discourage trial, and to encourage a guilty plea, and the prosecutor expressly so advised the defendant before trial. * * * In our case, there is no intimation that the prosecutor was acting with vindictiveness in seeking the indictment for assaulting the officer, and the majority so finds. * * * Neither did he make any attempt to discourage any exercise of Goodwin's right to trial by jury. Thus, what the majority now adopts is a *per se* rule, the effect of which is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals believed that it was appropriate to apply in this case the prophylactic rules prescribed in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Those cases hold that before the government may increase charges or penalties following a criminal defendant's exercise of a post-conviction right of review, the increased penalty exposure must be justified by a narrowly defined showing of legitimate, non-vindictive motivating factors. In the absence of such a showing, the increase in penalty exposure is conclusively presumed to be the product of impermissible "vindictiveness." Contrary to the conclusion of the court of appeals, however, this Court has never intimated that the special prophylactic rules of *Pearce* and *Perry* apply to an increase in the severity of charges during the pretrial stage of a criminal case.

There is no logical basis for extending *Pearce* and *Perry* beyond their setting to the pretrial stage of a criminal prosecution. Increases in charges at the preliminary phase of criminal cases are both commonplace and appropriate in view of the continuous receipt by prosecutors of relevant information during the course of trial preparation.

Likewise, criminal defendants typically exercise a wide variety of procedural rights throughout the pretrial phase of a criminal case; prosecutors expect defense counsel to do so in an adversary system. In this context, there is no reasonable basis to presume "vindictiveness" simply because the prosecutor modifies charges at a point subsequent in time to the defendant's exercise of some pretrial procedural right.

Moreover, in those few cases in which an enhancement of charges may logically be traced to the defendant's exercise of a legal right, it is almost always permissible for the prosecutor so to respond. In view of "the interest of the State in efficient criminal procedure," the prosecutor may respond to the accused's exercise of a procedural right when the government has a "legitimate interest" in so doing, provided the response cannot be characterized as a "needless or arbitrary burden on the defendant's constitutional rights." *Corbitt* v. *New Jersey*, 439 U.S. 212, 220 n.9, 222-223 (1978). Thus, it is perfectly proper, in the pretrial stage of a criminal case, for the prosecutor to respond to the defendant's exercise of his right to stand trial by obtaining enhanced charges. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). This serves the valid governmental interest in encouraging the negotiation of guilty pleas in an overburdened criminal justice system.

Since the prosecutor's decision to increase charges before trial is only rarely linked to the defendant's exercise of a procedural right, and since, in those few cases where there is such a link, the prosecutor's actions ordinarily are permissible, a prophylactic rule that presumes improper "vindictiveness" has no logical application at this stage. Beyond this, however, application of a presumption of vindictiveness would impose severe burdens on trial judges, prosecuting attorneys, and criminal defendants as a class, without yielding any significant offsetting benefits. A decade of experience in the federal courts has shown that application of rules facilitating vindictive prosecution claims at the pretrial stage seriously encumbers the already complex process between arrest and trial

with burdensome and time-consuming hearings. Moreover, each such judicial hearing on the motivations for pretrial charging decisions intrudes deeply into the prosecutor's discretion—discretion committed to the Executive Branch by the Constitution. Finally, the inevitable effect of encouraging claims of vindictiveness through presumptions and prophylactic rules is that prosecutors are thereby encouraged to bring the most severe charges possible against defendants at the outset of criminal prosecutions in order to avoid becoming embroiled at a later time in "retaliation" controversies. In short, applying presumptions of vindictiveness in the pretrial context is counter-productive: these rules impose a serious and unnecessary burden on trial judges, prosecutors, and persons who are charged with crimes.

It is manifest in this case that the preferral of more severe charges against respondent was in no way motivated by a desire to retaliate against his request for a jury trial. But even indulging the presumptive hypothesis of the court of appeals that the action was retaliatory, the court of appeals' decision cannot stand in light of this Court's decisions in *Bordenkircher* and *Corbitt*. Those decisions unequivocally recognize that it is permissible for the prosecutor to impose greater charges on persons who exercise their right to stand trial, notwithstanding any chilling effect that such charges may have, because society has a strong interest in maintaining an efficient and manageable criminal justice system.

2. Even if it were appropriate to presume vindictiveness in a narrow category of cases in which charges are increased before trial, there clearly is no occasion for doing so in this case. Prophylactic rules are never applicable unless there is a "real threat of vindictiveness" (*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 28 (1973)), or a "realistic likelihood of 'vindictiveness'" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27). There is no such genuine hazard of vindictiveness here. Respondent has conceded (J.A. 18), and the court of appeals has found (Pet. App. 4a), that there was no "actual vindictiveness." This

alone is fatal to a due process claim. See *Moon* v. *Maryland*, 398 U.S. 319, 320-321 (1970). Moreover, a review of the events that preceded the prosecutor's decision to obtain a superseding indictment plainly demonstrates that there is no realistic likelihood of vindictive or retaliatory motivation.

3. Finally, even if it is assumed arguendo that there was a realistic likelihood of vindictiveness in this case and that the prosecutor must therefore justify his decision to obtain increased charges, the prosecutor more than sustained any burden of explanation that devolves on him in these circumstances. The prosecutor explained in his sworn affidavit, without contradiction, that his charging decision had nothing to do with respondent's decision to demand a jury trial. The prosecutor's decision rested solely on his careful evaluation of the case before trial and his determination, made in light of recently acquired information, that respondent was a dangerous criminal with an extensive record of violent misconduct. In these circumstances, failure to press a felony charge against respondent—a charge fully supported by the evidence—would have been a serious breach of the prosecutor's duty to the public.

ARGUMENT

I. THE SUBSTITUTION OR ADDITION OF INCREASED CHARGES AT THE PRETRIAL STAGE OF A CRIMINAL CASE SHOULD BE PRESUMED TO BE A PROPER EXERCISE OF PROSECUTORIAL DISCRETION, NOT VINDICTIVE ACTION IN VIOLATION OF THE DUE PROCESS CLAUSE

The court of appeals found a violation of the Due Process Clause in this case because the prosecutor increased the level of criminal charges "after defendant elected to be tried by a jury" (Pet. App. 4a). In the view of the court of appeals, an enhancement of charges occurring after the exercise of a procedural right generates a "*fear* of prosecutorial vindictiveness" (*id.* at 5a; emphasis in original). The court believed that *North*

Carolina v. *Pearce*, 395 U.S. 711 (1969), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), require dismissal of any increased charges that have the potential to generate such anxiety.

In reaching this conclusion, however, the court of appeals disregarded the special contexts in which *Pearce* and *Perry* arose. Both of those cases involved enhancement of charges or punishment following a defendant's exercise of his right to post-conviction review. In view of the facts presented in those cases, it was reasonable to presume that the response of the prosecutor or trial court had no purpose other than penalizing or retaliating against the exercise of that legal right. In those circumstances, this Court barred the increase in penalty exposure absent a narrowly circumscribed explanation of justifying circumstances.

In the pretrial stage of a criminal prosecution, however, the special prophylactic rules fashioned in *Pearce* and *Perry* have no legitimate application, since there is no basis in logic or experience to presume that the sole or predominant purpose for a modification of charges is the penalization of the exercise of a legal right. At this preliminary stage, the prosecutor ordinarily engages in trial preparation and continuing investigation, which frequently leads to the discovery of new information necessitating an adjustment of charges. At the same time, the accused, who also is engaging in trial preparation, typically exercises a variety of routine procedural rights. In most cases in which it becomes appropriate for the prosecutor to modify the charges, the accused already will have exercised some procedural right. In this pretrial context, we submit, the ordinary presumption should apply that the prosecutor is performing his duties in good faith when charges are increased, rather than indulging a presumption of vindictive or malicious purpose.

As we demonstrate below, the decisions of this Court have applied the special prophylactic rules of *Pearce* and *Perry* only to increases in charges occurring at the post-

conviction stage of criminal prosecutions. And the principles announced by this Court in its six decisions in this area militate strongly against an extension of *Pearce* and *Perry* to the pretrial stage.

A. Vindictiveness Can Be Inferred Only In Those Special Contexts In Which There Is A Substantial Probability That The Penalty Exposure Of The Accused Has Been Increased For The Purpose Of Penalizing The Exercise Of A Legal Right

1. The starting point for analysis of the question presented in this case is the presumptive validity of the discretionary charging decisions of the prosecutor. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 454-456 (1962); *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920). Moreover, "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors * * *. Prosecutors need not be entirely 'neutral and detached' * * *." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248 (1980). "In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Ibid.* These principles apply with particular force to federal prosecutors, who are charged by the Constitution and federal statute with the solemn duty to "take Care that the Laws be faithfully executed * * *." United States Constitution, Article II, Section 3; 28 U.S.C. 515-519, 547.

"The charging decision," of course, "is the heart of the prosecution function." ABA Standards for Criminal Justice, *The Prosecution Function* Standard 3-3.9, Commentary (1980). "A prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed * * *." *Ibid.* And while the prosecutor

usually may rely on police and other agencies for investigation of alleged criminal acts, "the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." Standard 3-3.1(a). In exercising his or her discretion in light of all relevant information, the prosecutor must "view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence." Standard 3-3.9, Commentary.

Set against these broad principles are the requirements of the Due Process Clause, as articulated in the decisions of this Court. In only two cases has this Court applied special prophylactic rules to guard against "vindictive" enhancement of charges or penalties faced by criminal defendants. Both cases involved increased penalty exposure after the case had reached the stage of entry of a judgment of conviction. And in both cases, the Court rested its ruling on the clear danger that enhancement in charges or penalties was a direct response by the government to the exercise of a post-conviction right to review, which had no purpose other than penalizing or burdening the exercise of that right.

a. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court reviewed the actions of state trial judges who had enhanced significantly the sentences imposed on convicted defendants after those defendants successfully invoked post-conviction review procedures and obtained reversal of their original convictions. The Court concluded that the Due Process Clause limits the imposition of harsher sentences after conviction upon retrial. In one of the cases before the Court, the conclusion was "inescapable" that the trial judge was "punishing [the defendant] for his having exercised his post-conviction right of review" (*id.* at 726); and in the other case, no "reason or justification" was suggested for the increased sentence "beyond the naked power to impose it" (*ibid.*). In analyzing the enhanced sentences in those cases, the

Court reasoned from the premise that imposing a more severe sentence "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside" would violate the Due Process Clause (*id.* at 723-724). The Court noted, however, that the "existence of a retaliatory motivation" would be "difficult to prove in any individual case" (*id.* at 725 n.20). In view of the clear hazard that vindictiveness motivated the sentences before it, and the difficulty in obtaining reliable proof on that issue, the Court adopted a special prophylactic rule (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[5]

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), this Court adopted a prophylactic rule, similar to that fashioned in *Pearce*, to guard against vindictiveness by the prosecutor at the post-conviction stage. In that case, the defendant sought a trial de novo in a state superior court following his initial misdemeanor conviction. The prosecutor responded immediately to the exercise of this post-conviction right by obtaining a felony indictment, which resulted in a sentence after conviction of five to seven

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[5] Justices Black, Harlan, and White concurred in part and dissented in part from the Court's judgment. Justice Black concluded that "the courts are not vested with any general power to prescribe particular devices '[i]n order to assure the absence of such a motivation.' * * * This is pure [judicial] legislation if there ever was legislation" (395 U.S. at 741). Similarly, Justice White concluded that the trial judge should enjoy discretion to impose an increased sentence based on "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding" (*id.* at 751).

years' imprisonment.[6] The Court concluded that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27. The Court reached this conclusion only after finding that there was a "realistic likelihood of 'vindictiveness,'" because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo*." *Ibid.* In this context, the Court ruled that "it was not constitutionally permissible for the State to respond to [the defendant's] invocation of his statutory right to appeal by bringing a more serious charge" (*id.* at 28-29), absent a showing that would dispel the appearance of vindictiveness such as a demonstration "that it was impossible to proceed on the more serious charges at the outset." *Id.* at 29 n.7.

In sum, in *Perry*, as in *Pearce*, the Court was faced with a post-conviction increase in penalty exposure that manifestly was triggered by the exercise of the defendant's right to seek review of his conviction. And there was a genuine hazard—if, indeed, it was not entirely obvious in each case—that the response was motivated solely by a desire to punish the accused for the exercise of that right. As we demonstrate below, this Court has refused to extend the special prophylactic rules of *Pearce* and *Perry* to cases in which it is not evident that the increase in penalty exposure was triggered by the exercise of a procedural right, or in which an increase, even if triggered by the exercise of a procedural right, serves a legitimate purpose apart from penalizing the accused for exercising a procedural right.

b. In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court declined to extend the prophylactic sentencing rule

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[6] The prosecutor obtained the enhanced felony charge, which was based on the same conduct that underlay the original misdemeanor charge, immediately "[a]fter the filing of the notice of appeal, but prior to the respondent's apearance for trial *de novo*." 417 U.S. at 23.

prescribed in *Pearce* to a two-tier prosecution system in which the defendant was first convicted in an inferior court and then appealed to a court of general jurisdiction for a trial de novo. The defendant claimed that imposition of greater punishment for the same charge following his appeal to the court of general jurisdiction was a "vindictive" response to his decision to seek a post-conviction remedy. This Court rejected that contention, concluding that the sentencing system did not present "hazards warranting the restraints called for in *North Carolina* v. *Pearce*" (407 U.S. at 119). While the Court recognized that *Pearce* prohibited the imposition of "a more severe penalty after reconviction * * * as purposeful punishment for having successfully appealed," it did not believe that, in the situation before it, vindictive responses would occur "with sufficient frequency to warrant the imposition of a prophylactic rule" (*id.* at 116). The Court saw no logical basis for adopting a presumption that the court of general jurisdiction, which resentenced the defendant following his trial de novo, would respond to the defendant's request for a trial de novo in a vindictive manner (*id.* at 117).

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), where a second jury imposed a more severe sentence on a defendant upon retrial following reversal of his original conviction, the Court refused to apply the prophylactic rule announced in *Pearce*. The Court concluded that the "hazard of vindictiveness" (*id.* at 25) is not present when a new jury imposes sentence following reconviction. While the Court recognized that a more severe sentence would be impermissible if its "only objective * * * is to discourage the exercise of constitutional rights" (*id.* at 33 n.20), it found that the "potential for such abuse of the sentencing process by the jury is * * * de minimis, in a properly controlled retrial" (*id.* at 26).[7]

[7] In reaching this conclusion, the Court rejected the argument that vindictiveness might result from the actions of the prosecutor at the second trial: "[I]t would be erroneous to infer a vindictive

In view of its conclusion that there was no "real threat of vindictiveness" in the case before it (*id.* at 28), the Court dismissed the suggestion that the risk of an enhancement of penalties after the exercise of a procedural right imposes an improper "chilling effect" on defendants (*id.* at 29-35). The Court noted that the defendant at bar "was not himself 'chilled' in the exercise of his right to appeal * * * and we doubt that the 'chill factor' will often be a deterrent of any significance" (*id.* at 33).

Thus, *Colten* and *Chaffin* establish that the special prophylactic rules of *Pearce* and *Perry* have no application in those situations in which it is not reasonable to presume that an increase in penalties is a direct response to the defendant's exercise of a legal right.

c. This Court's decisions also make it clear that the prophylactic rules of *Pearce* and *Perry* do not apply in cases in which an increase in charges or penalties, even though triggered by the defendant's exercise of a legal right, has a valid purpose and is not intended solely to retaliate against the exercise of that right. Thus, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it was permissible for the prosecutor to threaten the accused with increased charges if the accused did not plead guilty, and to follow up on that threat when the accused insisted on his right to stand trial. At this pretrial stage of the prosecution in which the prosecutor engaged in "give-and-take negotiation common in plea bargaining" (*id.* at 362), the Court found no element of improper "punishment or retaliation" (*id.* at 363). The Court recognized that the prosecutor has a legitimate interest at the bargaining table in persuading the defendant "to forgo his right to plead not guilty" (*id.* at 364).

Similarly, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), this Court upheld a state statutory scheme that

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motive merely from the severity of the sentence recommended by the prosecutor. Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence" (*id.* at 27 n.13).

authorized more lenient sentences for defendants who pleaded guilty in homicide cases. The Court reiterated that the government has a "legitimate interest" (*id.* at 222) in encouraging guilty pleas and affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224). Since this differential penalty scheme served "the interest of the State in efficient criminal procedure" (*id.* at 220 n.9) and was not a "needless or arbitrary burden on the [exercise of] constitutional rights" (*id.* at 223), the Court found no occasion for a presumption of malice or vindictiveness (*ibid.*):

> We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right.

In short, *Bordenkircher* and *Corbitt* establish that even when the state enhances charges against a criminal defendant in response to the exercise of a procedural right, that action is permissible if it serves a valid prosecutorial objective such as encouraging the entry of guilty pleas. The special prophylactic rules of *Pearce* and *Perry* do not apply in such a situation.

2. *a.* Even though this Court has never extended the prophylactic rules of *Pearce* and *Perry* to the pretrial stage of a criminal prosecution, and even though this Court has warned that those rules do not apply unless an increase in penalty exposure is a response to the exercise of a procedural right and serves no valid prosecutorial purpose, defendants in criminal cases have argued with ever increasing frequency that the rules fashioned in *Pearce* and *Perry* govern at the pretrial stage. Throughout the pretrial stage of a criminal case, of course, prosecutors are engaged in trial preparation and often receive new information that affects their view as to the proper charges to be pressed against defendants. Like-

wise, defendants routinely exercise various procedural rights under the Constitution, federal statutes, the Federal Rules of Criminal Procedure, and local district court rules. Defense counsel have had no difficulty in connecting the prosecutor's enhancement of charges against the accused (or the prosecutor's taking of other action contrary to the interests of the accused) with the accused's exercise of some procedural right, and repeatedly have filed pretrial dismissal motions based on claims of "vindictive" prosecution. Moreover, such claims have been readily asserted even though this Court ruled in *Bordenkircher* that the prosecutor may properly respond to the exercise of certain rights, such as the right to stand trial, with enhanced charges to achieve legitimate tactical objectives such as the encouragement of guilty pleas.[8]

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[8] We collect below only a few recent examples of such claims, described in the reported opinions of the courts of appeals. See, *e.g.*, *United States* v. *Currie*, 653 F.2d 1300 (9th Cir. 1981) (claim that a superseding indictment was a vindictive response to a decision to stand trial); *United States* v. *Shaw*, 655 F.2d 168 (9th Cir. 1981) (claim that the prosecutor's motion to set aside a guilty plea was a vindictive response to a defense motion for arrest of judgment); *United States* v. *Hollywood Motor Car Co.*, 646 F.2d 384 (9th Cir. 1981), petition for cert. pending, No. 81-1144 (filed Dec. 17, 1981) (claim that a superseding indictment was a vindictive response to a motion to change venue); *United States* v. *Schiller*, 424 A.2d 51 (D.C. Ct. App. 1980) (claim that increased charges were the result of a defense motion for consolidated trial); *United States* v. *Herrera*, 640 F.2d 958 (9th Cir. 1981) (claim that prosecutor's decision to try defendant on original charges after plea bargaining broke down was vindictive); *United States* v. *Burt*, 619 F.2d 831 (9th Cir. 1980) (claim that reindictment was a vindictive response to the defendant's suppression motion in a prior proceeding); *United States* v. *Griffin*, 617 F.2d 1342 (9th Cir. 1980) (claim that second indictment was a vindictive response to motion to dismiss first indictment); *United States* v. *Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980) (claim that superseding indictment was a vindictive response to demand for jury trial); *United States* v. *Shaw*, 615 F.2d 251 (5th Cir. 1980) (claim that a superseding information was a vindictive response to defense request to transfer case to a different magistrate); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (claim that

The courts of appeals, faced with an outpouring of such claims, have been unable to arrive at even a rough consensus on the proper method of analysis. For example, as the present case shows, the Fourth Circuit applies a "per se" rule (see page 9, *supra*) prohibiting any enhancement of charges after the defendant exercises a procedural right unless the prosecutor shows that it was impossible to lodge those charges at an earlier time. The Ninth Circuit has adopted the view that the prosecutor bears a "heavy burden" to dispel the "mere appearance" of vindictiveness when charges are increased before trial. See, *e.g.*, *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369-1370 (1976). The Fifth Circuit, by contrast, holds that an "increase in the severity or number of charges if done without vindictiveness may be easily explained." See, *e.g.*, *Miracle* v. *Estelle*, 592 F.2d 1269, 1277 n.14 (1979). All of these approaches rest on the premise—erroneous, we

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superseding indictment was a vindictive response to a request for bail); *United States* v. *Gardner*, 611 F.2d 770 (9th Cir. 1980) (claim that second indictment was a vindictive response to defense request for trial and exercise of "right" not to cooperate with the government); *United States* v. *Black*, 609 F.2d 1330 (9th Cir. 1979) (claim that new indictment was a vindictive response to defense motion to vacate guilty plea); *United States* v. *Thomas*, 593 F.2d 615 (5th Cir. 1979) (claim that additional charges were the result of defense motion seeking clarification of the indictment); *Chapman* v. *Estelle*, 593 F.2d 687 (5th Cir. 1979) (claim that prosecutor's refusal to engage in plea bargaining was a vindictive response to defendant's motion to set aside guilty plea); *United States* v. *Stacey*, 571 F.2d 440 (8th Cir. 1978) (claim that indictment was a vindictive response to defendant's effort to obtain return of confiscated evidence); *United States* v. *Groves*, 571 F.2d 450 (9th Cir. 1978) (claim that increased charges were a vindictive response to a dismissal motion under the Speedy Trial Act); *United States* v. *Sturgill*, 563 F.2d 307 (6th Cir. 1977) (claim that second information was a vindictive response to defendant's request to be tried by a judge rather than a magistrate); *Hardwick* v. *Doolittle*, 558 F.2d 292 (5th Cir. 1977) (claim that new charges were a vindictive response to defense efforts to remove case to federal court); *United States* v. *Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (claim that increase in charges was a vindictive response to "possible motions" by the defendant).

believe—that the prophylactic rules of *Pearce* and *Perry* should be extended far beyond their original scope and should be applied when charges are modified at the pretrial stage of a criminal prosecution.

b. Several recent cases involving claims of vindictive prosecution have produced more careful examinations of the doctrinal underpinnings of the prophylactic rules of *Pearce* and *Perry*. The justifications for applying those rules in the pretrial phase of a criminal prosecution were recently explored by the Sixth Circuit, sitting en banc, in *United States* v. *Andrews*, 633 F.2d 449 (1980). The majority dealt with the problems created by claims of vindictiveness at the pretrial stage not by establishing a general presumption of vindictiveness, but by prescribing a threshold requirement for defendants seeking to establish a prima facie case (633 F.2d at 454-455) and by affording prosecutors substantial latitude to rebut prima facie showings of vindictiveness (*id.* at 456). The dissenting judges, however, reached the conclusion, supported by the decisions of this Court, that prophylactic rules deriving from *Pearce* and *Perry* do not apply at all at the pretrial stage.

Judge Merritt noted in his dissent in *Andrews* that this Court "has never applied the concept of 'vindictiveness' announced in *Pearce* and *Perry* to a prosecutor's actions during the trial and pretrial stages of a criminal case" (633 F.2d at 457). He also described the severe practical problems created by extending *Pearce* and *Perry* to the pretrial stage (*id.* at 469):

> The concept of prosecutorial "vindictiveness" or the "likelihood of vindictiveness" is theoretically endless and unmanageable unless limited to the post-conviction * * * context. Otherwise, the concept is so elusive that nobody—judge, prosecutor, or defendant—can determine where it starts or stops. The concept also appears inconsistent with the competitive, adversary nature of the pretrial and trial process.
>
> By necessity, the public prosecutor must take hard positions contrary to the liberty interests of the ac-

> cused * * * on an endless variety of procedural, evidentiary, substantive and tactical questions. * * *
>
> Once a defendant has successfully asserted a particular legal right in the course of the criminal process over the prosecutor's objection, is the prosecutor arguably guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interests of the defendant? If not, why not, and what is the standard of measurement?

Beyond these difficulties, Judge Merritt explained that there are many situations—including the situation before the court in which it was alleged that the prosecutor obtained enhanced charges in retaliation for the successful effort of the defendants to secure release on bail after threatening a government witness—in which it is wholly permissible for the prosecutor to respond to the exercise of a legal right with increased charges to serve a valid prosecutorial objective (633 F.2d at 459-460):

> If the defendant had consented to stay in jail, the prosecutor might not have added a conspiracy count. But the prosecutor believed that the defendants had threatened to harm a government witness. The prosecutor retaliated by opposing bail. Having lost on that issue, the prosecutor probably added the conspiracy count for reasons similar to those that led the government to put the witness under the Federal Protection Act—in order to show the defendants that the government intended to fight harder to protect its witnesses and get a conviction now that the defendants were back on the street. * * * [T]o require, as a general principle, the general absence of "prosecutorial vindictiveness" in the heat of battle is an unworkable goal in our adversary system.

Thus, even adopting the defendants' hypothesis that the prosecutor's actions were taken in response to the request for bail, Judge Merritt found no violation of the Due Process Clause.

Judge Martin joined the views of Judge Merritt, and pointed out that application of prophylactic rules to pretrial increases in charges would burden the judicial system without yielding significant benefits (633 F.2d at 460):

> [O]ur system of government vests the United States Attorney with wide discretion in handling criminal charges. So long as he possesses facts sufficient to convince a Grand Jury that a crime has been committed and that the charged defendant has committed that crime, he may proceed to seek an indictment. Once charged, the prosecutor's responsibility becomes more difficult. Guilt of the charge must be proven beyond a reasonable doubt. * * * To impose an additional hearing upon the District Court each time a superseding indictment is filed does nothing more than further defeat the ends of justice. There are many other ways to harness an overzealous prosecutor.

Judge Kennedy, also dissenting in *Andrews*, emphasized other significant costs involved in applying *Pearce* and *Perry* to increases in charges at the pretrial stage. She observed (*id.* at 461) that a test for prosecutorial retaliation that "too easily lets a defendant challenge prosecutorial conduct will have the undesirable effect of curbing prosecutorial discretion to a significant degree. For example, * * * the prosecutor may be forced to bring every charge he conceivably can against each defendant at the initiation of the proceedings to avoid later becoming embroiled in a 'retaliation' controversy."

Judge Engel agreed with the other dissenting judges in *Andrews* and explained that application of *Pearce* and *Perry* to pretrial charging decisions would encroach significantly on the traditional discretionary functions of the executive branch (*id.* at 465-466):

> The discretion to charge persons accused of crime is the function of the executive branch acting through the prosecutor, historically protected from abuse by

> the interposition of the grand jury. There are undoubtedly many occasions when the exercise of that discretion may subject the executive branch to the danger of appearing vindictive or arbitrary or unjust. For the most part, however, correction should lie in the political process to which the executive is subject. Correction in the area of executive discretion should only rarely be a judicial function.

The latest decision of an appellate court to consider the applicability of *Pearce* and *Perry* to modifications in charges at the pretrial stage of a criminal prosecution is the decision of the New Mexico Supreme Court in *State* v. *Stevens*, 96 N.M. 627, 633 P.2d 1225 (1981). In that case, the court ruled that the prophylactic rules prescribed in *Pearce* and *Perry*, which authorize a presumption of "vindictiveness" when charges are increased after the defendant has succeeded in having his conviction set aside, have no application at the pretrial stage. The court explained the grounds for its ruling as follows (633 P.2d at 1227-1228):

> [W]e note that the U.S. Supreme Court has never applied the vindictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case. *Bordenkircher* was the only case presenting pretrial activity, and there, despite clearly vindictive conduct, the Court declined to apply the doctrine. * * *
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> * * * *
>
> At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. As pointed out by Judge Merritt [dissenting in *United States* v. *Andrews*, *supra*], many actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice. We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness. Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion. Pros-

> ecutors would be required to justify actions properly taken as adversaries but which may appear vindictive, adding additional burdens to the criminal justice system. Prosecutors might feel compelled to press the severest charges possible at the outset, to the detriment of defendants.[9]

This, we submit, is a correct construction of this Court's decisions under the Due Process Clause. At the pretrial stage of a criminal prosecution, there is no presumption that a modification of charges manifests "vindictiveness" or "malice" on the part of the prosecutor; nor is the prosecutor required to come forward with narrowly circumscribed explanations to justify an exercise of his charging discretion. The presumption at this stage of a prosecution is that the prosecutor has performed his duty in a lawful manner. That presumption can be displaced only by a clear and convincing demonstration that the prosecutor's actions were intended to retaliate for the exercise of a legal right and served no valid prosecutorial purpose. See generally *Oyler* v. *Boles*, *supra*, 368 U.S. at 456; *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364; *Gregg* v. *Georgia*, 428 U.S. 153, 224-225 (1976) (White, J., concurring); *United States* v. *Blitstein*, 626 F.2d 774, 782 (10th Cir. 1980).

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[9] The New Mexico Supreme Court further explained that, while prophylactic rules do not apply at the pretrial stage of a criminal prosecution, and thus "a defendant does not have the benefit of a presumption at the pretrial stage," he may nonetheless, in an appropriate case, "present evidence of vindictiveness and request relief from the Court." 633 P.2d at 1228-1229. Accordingly, while the prosecutor's charging decision is presumptively lawful, and the prosecutor is not required to sustain any burden of justification for an increase in charges, the defendant is free to tender evidence to the court to support a claim that enhanced charges are a direct and unjustifiable penalty for the exercise of a procedural right. Of course, only in a rare case would a defendant be able to overcome the presumptive validity of the prosecutor's actions through such a demonstration. See *United States* v. *Andrews*, *supra*, 633 F.2d at 461 (Kennedy, J., dissenting).

B. Application Of The Prophylactic Rules Of *Pearce* and *Perry* To Increases In Charges At The Pretrial Stage Of A Criminal Prosecution Would Yield Only Minimal Benefits While Imposing Serious Burdens On Trial Judges, Prosecutors, And Criminal Defendants As A Class

As we have explained above, the prophylactic rules of *Pearce* and *Perry*, when they properly apply, bar any increase in criminal charges or penalties following the exercise of certain procedural rights unless the government bears the burden of justifying that increase through a narrowly circumscribed explanation of motivating circumstances. Thus, in effect, the prophylactic rules erect a presumption of vindictiveness or malicious purpose that the government must surmount if it seeks to increase the defendant's exposure to criminal penalties. As we demonstrate below, however, there is no logical or empirical basis for adoption of such a presumption when charges are adjusted at the pretrial stage of a criminal case. Moreover, any attempt to apply such a presumption would impose serious burdens not only on trial judges and prosecutors, but also on criminal defendants as a class.

1. *a.* In contrast to the post-trial stage of a criminal case, the pretrial stage is characterized by a salient factor: both the prosecution and the defense are busily and competitively engaged in preparation for trial. This means that, in the absence of a guilty plea, defense counsel ordinarily will exercise a variety of procedural rights and will make motions for continuances, for discovery and production of exculpatory materials, for suppression of evidence, for dismissal or clarification of indictments or informations, for adjustment of bail, for transfer of venue, for severance, for rulings in limine, and the like. Indeed, in almost every situation in which the prosecutor has occasion to consider the need for revised charges, the defendant will already have exercised some pretrial procedural right. Exercise of such procedural rights is

largely routine in nature.[10] Prosecutors expect defense counsel to exercise such rights in an adversarial system. Accordingly, it is not reasonable to suppose that such action by the defense will engender a "vindictive" response by the prosecutor "with sufficient frequency to warrant the imposition of a prophylactic rule" (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 116).

Moreover, when the prosecutor is confronted with these pretrial motions, he has not yet invested the time and resources in a case that are at stake when the case reaches final judgment. And the making of these motions does not threaten to upset a victory obtained after trial or require the prosecutor to "do over" what he thought he "had already done correctly" (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 117), as is true of a successful post-conviction appeal or a demand for trial de novo. In short, the "opportunities for vindictiveness in this situation" are not sufficient "to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27). As the New Mexico Supreme Court explained in *State* v. *Stevens*, *supra*, 633 P.2d at 1228: "At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. * * * We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness."

Furthermore, at the pretrial stage the prosecutor often engages in supplemental investigation to prepare for trial and receives information relevant to the charges against the accused. As the case nears trial, additional evidence is gathered and witnesses are interviewed; it is also common for a co-defendant to plead guilty, to be-

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[10] "On its face, a request of this nature carries with it much less potential for inviting punitive retaliation by the prosecution than, for example, successfully appealing a conviction or securing a mistrial, both of which exact from the prosecution the effort and expense of a new trial." *United States* v. *Schiller*, *supra*, 424 A.2d at 57.

gin to cooperate, and to provide new information about the acts of those who do not plead guilty. Likewise, it is not unusual for one prosecutor to transfer a case to another, leading to a reevaluation of charges. See, *e.g.*, *United States* v. *Ricard*, 563 F.2d 45, 48 (2d Cir. 1977); *Hardwick* v. *Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977). As the facts in this case show, such a transfer may prompt additional investigation, and this in turn may lead to the discovery of information calling for a modification of charges. In this pretrial context, we submit, it is most unlikely that the prosecutor's adjustment of charges (or his taking of other action contrary to the interests of the accused) will reflect a reaction to the defendant's exercise of a procedural right, rather than a good faith evaluation of the case based on independent considerations. Accordingly, indulgence of a "presumption" of vindictiveness in the pretrial setting would exceed the bounds of reasonable inference.[11]

Finally, in those few cases in which an increase in charges or other action contrary to the interests of the defendant can reasonably be traced to the exercise of a procedural right before trial, it is almost always permissible for the prosecutor to so respond in an adversary context. As noted on pages 20-21, *supra*, the Due Process Clause is not offended by increases in charges or penalties that are not a "needless or arbitrary burden on the defendant's constitutional rights" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223). The Due Process Clause is not infringed if the prosecutor enhances charges in response to the exercise of a procedural right if he thereby serves

[11] "[T]he most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it." *McCormick on Evidence* 807 (2d ed. E. Cleary 1972). No logical inference of "vindictiveness" arises, however, simply because charges are enhanced at a point subsequent in time to the defendant's exercise of some pretrial procedural right.

a legitimate prosecutorial objective. Thus, as this Court held in *Bordenkircher* v. *Hayes*, *supra*, it is wholly permissible for the prosecutor, engaged in plea negotiations prior to trial, to "up the ante" if the defendant insists on his right to stand trial. And the prosecutor certainly is free to seek enhanced charges in response to a defendant's repudiation of a plea agreement. See *United States* v. *Herrera*, 640 F.2d 958, 961-962 (9th Cir. 1981); *United States* v. *Moore*, 653 F.2d 384, 387-388 (9th Cir. 1981); *United States* v. *Anderson*, 514 F.2d 583, 588 (7th Cir. 1975). Similarly, if the defendant insists on seeking a transfer of venue to another district, and additional criminal charges are properly laid in that district but could not have been brought in the district where the indictment originally was returned, it should be permissible for the prosecutor to respond to the transfer by bringing additional valid charges. See pages 3, 18 n.13 of the government's petition for certiorari in *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (filed Dec. 17, 1981). By the same token, if a defendant challenges an indictment as duplicitous or as based on the wrong statute, the prosecutor's correction of the indictment, even if it results in an increase in charges, is entirely proper. See *United States* v. *Westoff*, 653 F.2d 1047, 1051 (5th Cir. 1981); see also *United States* v. *Partyka*, 561 F.2d 118, 124 (8th Cir. 1977); *United States* v. *Stacey*, 571 F.2d 440, 444 (8th Cir. 1978).

In short, there will be very few cases in which it may logically be inferred—even assuming that an increase in charges is a response to the exercise of a legal right before trial—that the prosecutor is imposing a "needless or arbitrary burden" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223) on the defendant's exercise of legal rights rather than pursuing a legitimate prosecutorial objective.[12] We doubt, therefore, that adoption of a

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[12] See also *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 27 n.13: "[I]t would be erroneous to infer a vindictive motive merely from the severity of the sentence recommended by the prosecutor [after

"presumption" of vindictiveness in the pretrial context is in accordance with reality or is a significant aid in isolating those few cases in which improper prosecutorial conduct occurs.

b. We have contended above that the search for prosecutorial vindictiveness through a "rigid constitutional rule" (*Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 365) at the pretrial stage of a criminal prosecution is an unjustified undertaking. Beyond this, however, the rigid prophylactic approach promises little realistic benefit for criminal defendants. A presumption of vindictiveness is not needed to protect defendants against charges that are unsupported by the evidence. By hypothesis, the charges in question are charges that are factually supported. The objection to the charges is not that they are without evidentiary support or are not in the public interest, but rather that the prosecutor had improper considerations in mind when he decided to obtain them. If, in fact, charges are without foundation, they will be screened out by the grand jury, the petit jury, and the reviewing court. Thus, there already are ample safeguards to prevent a vindictive prosecutor from obtaining charges that are unwarranted by the evidence or from charging innocent persons solely to satisfy a malicious purpose.[13]

Nor is the adoption of a rigid prophylactic rule needed to avoid "chilling" the exercise of procedural rights. This Court already has held that the "chilling effect"

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the defendant has succeeded in obtaining a retrial]. Prosecutors often request more than they can reasonably expect to get * * *."

[13] "[T]he defendants have the constitutional protection provided by the grand jury system to stand between them and their accusers. That system guarantees that, regardless of the motives of the prosecutor, the charges against them will be supported by probable cause before they must face them. Thereafter, the defendants can seek dismissal if the proofs are insufficient to support the charge. The jury, being unpersuaded, can acquit them. Finally, if the defendants are convicted, the Court itself stands as an effective shield * * *." *United States* v. *Andrews*, *supra*, 633 F.2d at 467-468 (Engel, J., dissenting).

rationale is not in itself a sufficient basis for adopting such a rule. See *Chaffin* v. *Stynchcombe*, *supra*. 412 U.S. at 29-35. And we are aware of no information suggesting that a rigid prophylactic rule, applied at the pretrial stage of a criminal prosecution, is necessary to facilitate the exercise of procedural rights. This record certainly contains no suggestion that prophylactic rules are required. In this case, respondent exercised his procedural right, the prosecutor obtained enhanced charges, and respondent continued to insist on his right to stand trial before a jury. Thus, respondent "was not himself 'chilled' in the exercise of his right * * * by the possibility of a higher sentence * * * and we doubt that the 'chill factor' will often be a deterrent of any significance." *Id.* at 33.

Application of a "chilling effect" rationale in cases such as this, in which it is supposed that criminal defendants might be discouraged from insisting on their right to stand trial or to demand trial by jury, would be particularly inappropriate. Even assuming that prosecutors sometimes prefer increased charges against defendants who insist on such rights, and that the effect of this action is to encourage guilty pleas and trials by magistrate rather than resource-consuming trials by jury, that would be wholly permissible under *Bordenkircher* v. *Hayes*, *supra*, and *Corbitt* v. *New Jersey*, *supra*. To the extent that prosecutors attempted to achieve such objectives, they would be serving "the interest of the State in efficient criminal procedure" (*Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 220 n. 9), and would not be imposing a "needless or arbitrary burden on the exercise of constitutional rights" (*id.* at 223).

2. *a.* While we are of the view that the benefits stemming from the use of prophylactic rules at the pretrial stage of a criminal prosecution are minimal, the burdens imposed on trial judges, prosecutors, and criminal defendants as a class are substantial. Claims of vindictive prosecution can be fashioned in almost every case

in which it is necessary to adjust charges, since defendants in criminal cases may claim in nearly every instance that such adjustments occurred subsequent in time to the exercise of some procedural right (see note 8, *supra*). Such claims are not limited, moreover, to cases in which charges are increased. Whenever the prosecutor takes some action contrary to the interests of the accused, that action can be characterized as "vindictive." [14] Thus, defendants have contended that any modification of charges—even a *reduction* in charges—has the potential for "prejudice" of various kinds and gives rise to a presumption of vindictiveness requiring a hearing to explore the prosecutor's motives. See the government's petition for certiorari in *United States* v. *Hollywood Motor Car Co.*, No. 81-1144, *supra*, at 5, 18 n.13; see also *United States* v. *D'Alo*, 486 F. Supp. 954, 960 (D.R.I. 1980). Prophylactic rules have created a powerful temptation for "[d]efense counsel * * * to monitor every word spoken by a prosecutor, in and out of court, to find some phrase indicative of his 'vindictiveness.'" *Koski* v. *Samaha*, 648 F.2d 790, 798 (1st Cir. 1981). Defendants have even claimed, with judicial acceptance, that prosecutorial action contrary to their interests is "vindictive" if it is made in connection with future "possible motions" by the defense. See *United States* v. *Alvarado-Sandoval*, 557 F.2d 645, 646 (9th Cir. 1977); *United States* v. *Andrews*, *supra*, 633 F.2d at 459 (Merritt, J., dissenting).

The outpouring of such motions in the federal courts in the last decade has imposed a substantial burden on district judges who are required to conduct hearings and to expend scarce resources for the resolution of such

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[14] "During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining * * *." *United States* v. *Andrews*, *supra*, 633 F.2d at 459 (Merritt, J., dissenting).

claims. Some circuits now place a "heavy burden" of rebuttal on the prosecutor whenever the defendant alleges a "mere appearance" of vindictiveness (see, *e.g.*, *United States* v. *Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976)), and place an equally heavy burden on the district courts to conduct "an evidentiary hearing where the government's explanations can be formally presented and tested," complete with "findings of fact and conclusions of law" (*United States* v. *Andrews*, *supra*, 633 F.2d at 457). Judge Engel, dissenting in *Andrews*, explained the practical effect of such procedures, which under ordinary circumstances must be completed before trial (*id.* at 466-467):

> My most fundamental objection is that the pre-trial procedures mandated by the majority opinion are wasteful of time, will unnecessarily delay the trial and are altogether out of proportion to the problem which is perceived.
>
> * * * * *
>
> The result, regardless of success, is delay. As this opinion is written, nearly five years have transpired since the alleged offenses and arrest [of the defendants] in November, 1975. It is true that not all delays are due to this litigation, but it has since March, 1978 played a substantial role in that delay. The majority rule places a heavy burden upon district courts without sufficient promise of benefit to justify it.

He added that such procedures create "needless complication and further uncertainty in the already overburdened processes leading from arrest to trial" (*id.* at 467). Thus, weighing the "potential benefits" of this approach against its "potential injury" in the form of increased burdens on the district court (*United States* v. *Calandra*, 414 U.S. 338, 349 (1974), it is sufficiently clear that a convincing case has not been made for extending prophylactic rules that presume vindictiveness to the pretrial stage.

b. The burden on prosecuting attorneys resulting from such prophylactic rules also is substantial. At a minimum, the prosecutor must file affidavits, and perhaps also testify, about his or her reasons for seeking enhanced charges or taking other action contrary to the interests of the accused, in order to rebut a "presumption" of maliciousness. Briefing and oral argument must then ensue (see C.A. App. 53-79; Nov. 7, 1979 Tr. 169-210), and the claim of prosecutorial vindictiveness is almost always renewed on appeal. This collateral litigation consumes scarce prosecutorial resources and hampers vigorous law enforcement efforts by prosecutors, who may refrain from bringing valid supplemental charges "to avoid later becoming embroiled in a 'retaliation' controversy." *United States* v. *Andrews*, *supra*, 633 F.2d at 461 (Kennedy, J., dissenting).

Beyond this, however, prophylactic rules, with their attendant presumption of malicious conduct, effectively turn the tables of the criminal case and place the discretionary charging decision of the prosecutor on trial at the commencement of the litigation. This creates an unseemly confrontation between judicial and executive authorities because it "represents an intrusion into an area historically reserved to the executive branch" (*id.* at 462, Engel, J., dissenting). Both the Constitution and federal statute expressly provide that it is the executive branch alone that must "take Care that the Laws be faithfully executed." See United States Constitution, Article II, Section 3; 28 U.S.C. 515-519, 547. In emphasizing this fundamental principle of separation of powers, Judge Engel cited (633 F.2d at 466) the opinion of Chief Justice Burger, then Circuit Judge, in *Newman* v. *United States*, 382 F.2d 479, 481 (D.C. Cir. 1967): "An attorney for the United States, * * * as agent and attorney for the Executive, * * * is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment."

c. Finally, the predictable consequence of adopting "presumptions" and prophylactic rules that limit, if not foreclose, the discretion of prosecutors to increase charges is that prosecutors will be heavily influenced to bring the most severe charges possible at the outset of the litigation to avoid subsequent claims of "retaliation." [15] The practical effect of a presumption of vindictiveness "is that a prosecuting attorney must see to it that formal charges are *initially* filed for the most serious offense of which a defendant may be guilty or else forever forfeit the right to so prosecute him if the defendant contests the prosecution in any way" (Pet. App. 15a; Widener, J., dissenting). Or, in the words of Judge Kennedy, dissenting in *Andrews* (633 F.2d at 461), "the prosecutor may be forced to bring every charge he conceivably can against each defendant at the initiation of the proceedings * * *." Thus, the prophylactic rule adopted in this case is "to the detriment of both defendant and State," because it will "diminish the likelihood" of "lenient" charging decisions at the outset of criminal prosecutions. *Colten* v. *Kentucky*, *supra*, 407 U.S. at 119; see also *United States* v. *Partyka*, *supra*, 561 F.2d at 124.

d. The literal terms of the Due Process Clause do not require that heavy burdens, of the kind that we have discussed, be placed on the judiciary, prosecuting attorneys, and criminal defendants as a class. Moreover, as we have demonstrated above, this Court has never suggested that the prophylactic rules of *Pearce* and *Perry* apply to pretrial increases in criminal charges. Since the costs of extending the vindictiveness presumption of *Pearce* and *Perry* so clearly outweigh any speculative benefits, we submit that the flexible require-

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[15] Prosecutors fully realize that, if a retaliation controversy arises, they may lose the opportunity to try charges that are amply supported by the evidence. Thus, prophylactic rules are "more drastic than * * * the exclusionary rule, for [they] would exclude not merely evidence of crime but the government's right to seek prosecution on the charge itself." *United States* v. *Andrews*, *supra*, 633 F.2d at 462 (Engel, J., dissenting).

ments of due process are best served by confining those decisions to their intended ambit—increases in penalties that occur at the post-conviction stage of criminal prosecutions.

II. THE FACTS OF RECORD DO NOT DISCLOSE A GENUINE HAZARD OF PROSECUTORIAL RETALIATION SUFFICIENT TO JUSTIFY A PRESUMPTION OF VINDICTIVENESS IN THIS CASE

For the reasons that we have summarized above, the prophylactic rules of *Pearce* and *Perry* should never be applied to increases in charges that occur at the pretrial stage of a criminal prosecution. However, even if this Court were to disagree with that submission, and were to conclude that a presumption of vindictiveness may be appropriate in *some* pretrial situations, there still would be no occasion to apply that presumption in a case such as this. As the decisions of this Court establish, prophylactic rules are never appropriate unless there is a clear danger of vindictiveness in the particular situation under review. The nature of the right exercised by respondent is not such that prosecutors would generally be likely to retaliate by increasing charges in cases like this one. Nor does the record even remotely suggest that the prosecutor's decision to increase charges in this case was likely to have been a vindictive response to the defendant's decision to stand trial.

A. Prophylactic Rules Do Not Apply Unless There Is A Substantial Danger of Vindictiveness

The major premise of the court of appeals' decision to apply the prophylactic rules of *Pearce* and *Perry* to the facts of this case was its perception that respondent may have experienced a "fear of prosecutorial vindictiveness" that would "chill" the exercise of his right to stand trial and to demand a jury (Pet. App. 5a-6a). This Court's decisions establish, however, that the relevant focus is not on "the possibility that a defendant might be deterred from the exercise of a legal right * * *, but

rather [on] the danger that the State might be retaliating against the accused." *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 363. See also *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 218 ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid"). Thus, there is "no doubt about the constitutional validity" of higher charges "in the absence of vindictiveness despite whatever incidental deterrent effect they might have * * *" (*Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29). The relevant concern is "actual vindictiveness" (*id.* at 26). Prophylactic rules designed to prevent "actual vindictiveness" apply only when there is a "realistic likelihood of 'vindictiveness'" (*Blackledge* v. *Perry*, *supra*, 417 U.S. at 27), a "hazard of being penalized" solely for exercising a legal right (*Colten* v. *Kentucky*, *supra*, 407 U.S. at 116), or a "real threat of vindictiveness" that is more than "de minmis" (*Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 25-26, 28).[16]

"Put another way, the mere appearance of vindictiveness is not enough. * * * The factual situation must pose a realistic likelihood of vindictiveness." *United States* v. *Andrews*, *supra*, 633 F.2d at 455. Moreover, the standard is "an objective one." It "does not depend on a defendant's subjective impressions." *Id.* at 454. This Court's decisions clearly establish that a bare assertion that the defendant experienced a "chilling effect" is totally inadequate to give rise to a presumption of vindictiveness. *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29-35. As we demonstrate below, there is no genuine

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[16] Inexplicably, despite the clarity of this Court's pronouncements on this subject, some courts have held that a presumption of vindictiveness arises whenever there is a change in charges that gives rise to a "mere appearance of vindictiveness." See, *e.g.*, *United States* v. *Ruesga-Martinez*, *supra*, 534 F.2d at 1369 ("the mere *appearance* of vindictiveness is enough to place the burden on the prosecution") (emphasis in original); *United States* v. *Jamison*, 505 F.2d 407, 416 (D.C.Cir. 1974) (the "possibility of retaliation" is sufficient).

hazard of vindictiveness in the present case that could be thought to justify the adoption of a prophylactic rule.

B. Nothing In The Record In This Case Suggests That The Prosecutor Obtained Enhanced Charges For The Explicit Purpose Of Penalizing Respondent For Exercising A Legal Right

The record in this case is so far removed from a situation in which a genuine likelihood of vindictiveness exists that the court of appeals was able to say (Pet. App. 4a): "On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment." Indeed, there has never been a claim from respondent that the prosecutor acted vindictively. As respondent candidly stated in his memorandum in support of his motion to dismiss count one of the indictment (J.A. 18): "At the outset, it must be noted that the defendant does not assert actual vindictiveness on the part of the Government." In view of respondent's own concession, which is supported by the record and by the finding of the court of appeals, there is no possible basis for the view that this case presents a genuine danger of vindictiveness. If there was no vindictiveness *in fact*, there can be no realistic danger of vindictiveness. See *Moon* v. *Maryland*, 398 U.S. 319, 320-321 (1970), where this Court concluded that there could be no violation of *Pearce* in light of the defendant's "dispositive" concession: "I have never contended that Judge Pugh was vindictive."

In any event, wholly apart from respondent's concession and the court of appeals' conclusion, the facts in this case do not support an inference that there is a genuine hazard of vindictiveness. It is undisputed that neither of the prosecuting attorneys who participated in this case ever threatened respondent with increased charges. As noted on page 4 above, Ms. Bruce, the original prosecutor who engaged in plea discussions, never gave any thought to the possibility that increased charges might be obtained. And Mr. Norton, the suc-

cessor prosecutor who obtained increased charges, never discussed the possibility of a waiver of any legal right. Moreover, Ms. Bruce merely responded to a *defense inquiry* about a possible guilty plea. There is no suggestion that either Ms. Bruce or Mr. Norton were dissatisfied with respondent's decision to seek a trial by jury or viewed it as anything other than a routine pretrial decision. If either prosecutor had in fact desired to chill the exercise of respondent's right to a jury trial, he or she would have threatened respondent with an increase in charges to obtain a waiver of the constitutional right.

In addition, the chronology of relevant events is not in the least suggestive of vindictiveness. The original charges in this case were filed by a police officer, who could not himself obtain a felony indictment. Three years later, after respondent was returned to the jurisdiction, the case was assigned to Ms. Bruce, who appeared temporarily before the magistrate. She too lacked power to obtain a felony indictment. Finally, when it became clear that the case was going to be tried before a jury and that trial preparation would be required, it was transferred to an Assistant U.S. Attorney who commenced trial preparation. Only after he had worked on the case for a substantial period of time did he decide to seek a felony indictment. See pages 5-7, *supra*.

These facts do not suggest a vindictive response to a decision to stand trial and demand a jury. They simply show that lenient charges, originally preferred by a police officer, were deemed inadequate by a successor prosecutor who reevaluated the case three years later in the course of preparing for trial.[17] Moreover, it is

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[17] See *United States* v. *Sturgill*, 563 F.2d 307, 309-310 n.3 (6th Cir. 1977):

> The original complaint was signed by a supervisory security assistant at the Naval Ordnance Station. * * * [W]e think that additional charges in the information would probably be justified, even if the potential sentence was significantly increased. To hold otherwise would unduly restrict the prosecuting attorney from making an independent examination of

undisputed that the prosecutor who obtained the increased charges was not the same prosecutor who engaged in unsuccessful plea discussions with the defense. See generally *Colten* v. *Kentucky*, *supra*, 407 U.S. at 117. To perceive a genuine hazard of "vindictiveness" in such a set of circumstances, we submit, is to indulge imagination rather than rational inference.

III. EVEN IF THE PROPHYLACTIC RULES OF *PEARCE* AND *PERRY* APPLY IN THIS CASE, THE PROSECUTOR FULLY JUSTIFIED HIS ACTIONS

As we have argued in Part I, the prophylactic rules of *Pearce* and *Perry* have no application in this case because they should not be extended to increases in charges that occur at the pretrial stage of a criminal prosecution. Moreover, as we have contended in Part II, even if such rules were thought to apply to some pretrial modifications of charges, those rules should not be applied in the present case because there is no realistic danger of vindictiveness. However, even if this Court were to disagree with both of these submissions, the decision of the court of appeals should still be reversed. That result is required because the prosecutor has completely dispelled any appearance of vindictiveness that reasonably could be thought to arise on this record.

A. An Appearance Of Vindictiveness Resulting From Pretrial Increases In Charges Is Always Subject To Rebuttal By Evidence Showing That The Prosecutor Was Motivated By A Valid Purpose

For the reasons summarized on pages 13-39, *supra*, we submit that the adoption of "presumptions" of vindictiveness, which require the prosecutor to come forward with evidence justifying charges obtained after the accused

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the criminal conduct and substituting his formulation of the appropriate charges in place of the lay person's. In such a situation it does not appear that there is a "realistic likelihood of vindictiveness."

exercises a pretrial right, is a fundamentally misguided approach. This prophylactic approach serves no substantial purpose: it imposes needless burdens on trial judges, prosecutors, and defendants as a class. However, if prophylactic rules of any kind are to be recognized in the pretrial context, it is essential that prosecutors be granted broad latitude to rebut any asserted appearance of vindictiveness to avoid an undue restraint on their charging discretion. At the preliminary stage of a criminal prosecution, enhanced charges are frequently required because the prosecutor receives new information about the accused during the course of trial preparation. In addition, enhanced charges may be warranted to serve legitimate prosecutorial objectives of the kind discussed by this Court in *Bordenkircher* and *Corbitt*. Any prophylactic rule recognized in the pretrial phase of a criminal case must be sufficiently flexible to accommodate the legitimate needs of the prosecutor in exercising charging discretion.

Even at the post-conviction stage of a criminal prosecution, where this Court has concluded that the hazard of vindictiveness is great and the need for flexibility in adjusting penalties is diminished, it is well established that any appearance of vindictiveness can be dispelled if adequate non-vindictive reasons "affirmatively appear." *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726; see also *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n.7. Moreover, when criminal defendants have claimed that differential penalties impose a burden on the exercise of a pretrial right, such as the right to stand trial, this Court's decisions have been quick to penetrate any superficial appearance of vindictiveness. See *Corbitt* v. *New Jersey*, *supra*, 439 U.S. at 223: "We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right."

While some circuits, such as the Fourth Circuit in the case presently under review, have made it nearly impossible for the prosecutor to rebut the "appearance" of vindictiveness, other circuits, such as the Fifth Circuit, have adopted a more pragmatic approach. In the Fifth Circuit, "the prosecutor may rebut * * * prima facie proof [of vindictiveness] by establishing [that] his reasons for adding the * * * new charges were other than to punish a pesky defendant for exercising his legal rights." *Hardwick* v. *Doolittle*, *supra*, 558 F.2d at 301. The Fifth Circuit added that "explanations which would negate vindictiveness could include mistake or oversight in the initial action, a different approach to prosecutorial duty by the successor prosecutor, or public demand for prosecution on the additional crimes allegedly committed. The list is intended to be illustrative rather than exhaustive." *Ibid.* Accord, *Jackson* v. *Walker*, 585 F.2d 139, 148-149 & n.20 (5th Cir. 1978); *Miracle* v. *Estelle*, *supra*, 592 F.2d at 1277 n.14 (noting that "[a]n increase in the severity or number of charges if done without vindictiveness may be easily explained").

The Second Circuit also recognizes that a different approach by a successor prosecutor is sufficient to rebut a charge of vindictiveness. See *United States* v. *Ricard*, *supra*, 563 F.2d at 48 ("Another attorney had originally handled the case and filed the information charging a misdemeanor. The case was later assigned to [a successor prosecutor], and when she reviewed the file several weeks before the trial date, she realized the facts warranted adding a felony charge"). Similarly, the Sixth Circuit, sitting en banc in *United States* v. *Andrews*, *supra*, 633 F.2d at 456, recognized that increased charges may be justified simply because the prosecutor who obtained the original charges "was inexperienced" and failed to recognize the appropriateness of additional charges.

While we submit that all of these decisions suffer from a fundamental defect because they place the prosecutor

on trial at the commencement of the prosecution, mandate burdensome and time-consuming hearings, and inhibit the exercise of prosecutorial discretion by encouraging collateral litigation on the prosecutor's good faith, they at least have the merit of permitting the prosecutor broad latitude in rebutting defense allegations of prosecutorial misconduct. And if any presumptions of vindictiveness are to be indulged in the pretrial context, it is essential that the prosecutor be afforded an unrestricted opportunity to explain that increases in charges are justified by proper considerations.

B. The Prosecutor Clearly Established That The Increased Charges In This Case Rested On Proper Considerations

As summarized on pages 5-7, *supra*, the prosecutor in this case fully sustained any burden of explanation that rested on him. The prosecutor affirmed under oath in his affidavit, without contradiction of any kind, that the increased charges in this case rested on his investigation of respondent during pretrial preparation, which occurred after the case was transferred to him from another prosecuting attorney.[18] That investigation disclosed that, after the initial misdemeanor charges were lodged against respondent by Officer Morrissette, respondent fled to California, where he was convicted and imprisoned for another offense. Thereafter, respondent was tried

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[18] In our view, it is entirely irrelevant that the government might have obtained the information in question before respondent exercised his right to trial by jury. The pertinent question is whether the government acted on the basis of permissible considerations when it obtained increased charges, not whether it satisfied some standard of "due diligence" in finding all relevant information at a given point before trial. In any event, the district court correctly found, based on uncontradicted evidence, that the increased charges here were the product of continuing investigation and that "the prosecutor was not aware of the additional information on which the indictment was based" until after respondent exercised his procedural right (Pet. App. 23a).

and convicted in Virginia for attempting to shoot a police officer and for possession of large quantities of heroin. The prosecutor also considered the fact that respondent had committed perjury during his preliminary hearing in Hyattsville in 1976, and fled from the jurisdiction before his scheduled trial after being released on his own recognizance. In addition, the prosecutor's investigation disclosed that respondent was known to the federal Drug Enforcement Administration and to local police as a major heroin dealer, who associated with other persons who smuggled heroin from Mexico into several different states (see Pet. App. 25a-31a).

In view of this information, and the fact that respondent had committed a serious crime when he resisted arrest and struck Officer Morrissette with his automobile on the Baltimore-Washington Parkway, the prosecutor concluded that a felony count was fully warranted. The prosecutor's decision had nothing to do with respondent's exercise of a procedural right. As the prosecutor affirmed in his affidavit: "[M]y decision to seek a grand jury indictment was not motivated in any way by, nor did I ever consider Goodwin's request for a trial by jury in the United States District Court" (Pet. App. 31a). In these circumstances, it is certainly not surprising that the district court expressly found, after reviewing all of the evidence of record bearing on the issue of prosecutorial vindictiveness, that the prosecutor had "adequately dispelled any appearance of vindictiveness" (*id.* at 22a).

Unless this Court is prepared to adopt a prophylactic rule of unprecedented stringency, and to reject on a per se basis nearly every explanation for increased charges after an accused exercises a procedural right in the pretrial stage of a criminal case, the explanation offered in this case must be credited. In view of the prosecutor's overwhelming demonstration of good faith performance of duty, the sufficiency of the prosecutor's rebuttal can be summed up adequately in the words of the Fifth Cir-

cuit in *United States* v. *Thomas*, 617 F.2d 436, 438 (1980):

> By the time of the later indictment, the facts had unfolded to such a degree that a prosecutorial failure to go forward * * * would have been a dereliction of duty. There it ends.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 384947 770